Supreme Court, U.S.
FILED
05-422 AUG 1 - 2005
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KARL F. KLEINPASTE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Karl F. Kleinpaste, pro se
P.O. Box 1551
Beaver Falls, Pennsylvania 15010
Telephone: 724-843-0338

Question Presented

With regard to a prosecutor's presentation to the jury of only the dissenting opinion from *Cheek v. United States*, 498 U.S. 192 (1991), and related conduct: Is the Third Circuit's conclusion of "no reversible error" inconsistent with decisions by this Court, and related holdings by other circuits, with regard to proper prosecutorial conduct; and is a pro se defendant's due process right to a fair trial violated in such a case?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. THE DECISION IS AT ODDS WITH DECISIONS BY OTHER CIRCUITS IN CASES SIMILARLY SITUATED	5
II. THE DECISION IS AT ODDS WITH PRECEDENT SET BY THIS COURT	9
III. THE THIRD CIRCUIT FAILED TO CALL FOR CORRECTIVE ACTION IN THE FACE OF POISONING OF THE JURORS' MINDS	11
CONCLUSION	16

INDEX OF APPENDICES

	Page
Appendix A: Unpublished Opinion of the 3rd Circuit Court of Appeals, case number 03-2678 (argued July 2, 2004)	1a
Appendix B: Denial of Rehearing (May 3, 2005)	12a
Appendix C: Amendment V (pursuant to Supreme Court Rule 14.1(i)(v) referring to required material in Rule 14.1(f))	13a

TABLE OF AUTHORITIES

	Page
Cases	
Berger v. United States 295 U.S. 78 (1935)	7, 9-11, 13, 14
Blakely v. Washington 542 U.S. ____ (2004)	2
Cheek v. United States 498 U.S. 192 (1991)	i, 3-8, 11-14
Faretta v. California 422 U.S. 806 (1975)	2
Kyles v. Whitley 514 U.S. 441	12, 14
United States v. Alzate 47 F.3d 1103 (11th Circuit, 1995)	8
United States v. Booker 543 U.S. ____ (2005)	2, 15
United States v. Forlorma 94 F.3d 91 (2nd Circuit, 1996)	8
United States v. Irizarry 341 F.3d 273 (3rd Circuit,1991)	12

TABLE OF AUTHORITIES (continued)

	Page
United States v. Kerr 981 F.2d 1050 (9th Circuit, 1992)	14
United States v. Kojayan 8 F.3d 1315 (9th Circuit, 1993)	8
United States v. LaPage 231 F.3d 488 (9th, 2000)	6
United States v. Modica 663 F.2d 1173 (2nd Circuit, 1981)	7
United States v. Olano 507 U.S. 725 (1993)	15
United States v. Rodriquez 765 F.2d 1546 (11th Circuit, 1985)	13
United States v. Simtob 901 F.2d 799 (9th Circuit, 1990)	12
United States v. Thomas 943 F.Supp. 693 (E.D.Tex., 1996)	8
United States v. Udechukwu 11 F.3d 1101 (1st Circuit, 1993)	8
United States v. Valentine 820 F.2d 565 (2nd Circuit, 1987)	7

TABLE OF AUTHORITIES (continued)

	Page
United States v. Vouella 124 F.3d 389 (2nd Circuit, 1997)	8
United States v. Weatherspoon F.3d, 05 CDOS 5068 (9th Circuit, 06/13/05, case 03-10551)	7
United States v. Young 17 F.3d 1201 (9th Circuit, 1994)	8
United States v. Young 470 U.S. 1 (1985)	13
United States v. Zerbach 47 F.3d 1252 (3rd Circuit, 1995)	13
Rules	
F.R.Crim.P. Rule 52	10, 12, 14
Bar Rules	
American Bar Association Model Rules of Professional Behavior, Rule 3.3	14

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

KARL F. KLEINPASTE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

Petitioner Karl F. Kleinpaste respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The unpublished opinion of the Third Circuit, case number 03-2678, affirming the conviction of Karl F. Kleinpaste in the Western District of Pennsylvania, case number 02-CR-0065, filed May 3, 2005, is included in Appendix A.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 7, 2005. A petition for panel rehearing was denied on May 3, 2005 (Appendix B). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution reads, in relevant part, "nor [shall any person] be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Kleinpaste was indicted in April 2002. Over the course of summer 2002, several hearings were conducted during which time Kleinpaste sought his own representation, culminating finally in a proceeding pursuant to *Faretta v. California*, 422 U.S. 806 (1975), in which the District Court determined that Kleinpaste would be allowed to proceed pro se, when Kleinpaste could find no private attorney willing to take the case. Jury trial commenced November 18, 2002 and concluded November 25, 2002 with conviction on all counts.

Following conviction, Kleinpaste asked that the Federal Public Defender handle sentencing on his behalf. Sentencing was initially set for February 2003, but was delayed several times due to timing difficulties with regard to prosecution's late-filed motions and the need for defense counsel to have adequate time to respond to those motions. Sentencing was held May 23, 2003, at which time the Court sentenced Kleinpaste to 30 months' incarceration.

Representatives of the Federal Public Defender's office specifically requested to handle the appeal of the case.

Kleinpaste self-reported for sentence to FCI Elkton June 25, 2003 and was housed in the lowest-security environment there during the pendency of the appeal process. Argument was heard June 30, 2004, before a Third Circuit panel consisting of Judges Ambro, Aldisert, and Stapleton. Decision in the appeal was delayed due to complications raised by the questions surrounding sentencing enhancement vis-a-vis *Blakely v. Washington* (542 U.S. __, 2004) and *United States v. Booker* (543 U.S. __, 2005).

The Third Circuit issued an order for Kleinpaste's immediate release on Feb 16, 2005. Final decision was rendered March 7, 2005 (Appendix A), affirming conviction but vacating sentence. Petition for rehearing was filed, and then denied May 3, 2005 (Appendix B).

In pertinent part, the appeal was grounded on argument that the behavior of the prosecutor was fatally prejudicial to Kleinpaste's defense, insofar as the prosecutor read into the record from *Cheek v. United States*, 498 U.S. 192 (1991), using only a single paragraph from the dissent by Justice Blackmun, without explaining to the jury that the text they had just heard was not in fact the law, and in fact was the opposite of the law. Other behavior of note during trial included the prosecutor's angry outburst at a defense witness, for which the Court reprimanded him, and the fact that the Court upon objection once reprimanded the prosecutor for his sharp tongue during cross-examination of Kleinpaste, all such incidents cumulatively leading to the prosecutor himself issuing an unsolicited apology to the jury for his misbehavior (due to his "Irish temper"), but did not do so until closing argument.

Kleinpaste asked for mistrial as a result of the *Cheek* dissent quotation, motion denied; and then asked for a curative instruction to the jury, in response to which the Court said, "I'll certainly remind the jury that I am the arbiter of the law in this case and always have been," but no mention at all of the incident was ever made by the Court to the jury.

The relevant holding of the Third Circuit panel was that "Although it was ill-advised that the prosecutor chose to read an excerpt from the dissent [in *Cheek*]", even so "no reversible error" occurred as a result of the prosecutor's behavior.

However, the decision of the panel was 2:1, a dissent having been included by Judge Stapleton, in which he stated, "[I]t was prejudicial error to permit the government to read to the jury from Justice Blackmun's dissenting opinion in *Cheeks*[sic] *v. United States*, 498 U.S. 192 (1991)."